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VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE BANG ENERGY DRINK
MARKETING LITIGATION

**Case No. 4:18-cv-05758-JST-RMI
(Consolidated with 4:18-cv-06300)**

**DEFENDANT'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED CONSOLIDATED
COMPLAINT**

Date: May 13, 2020
Time: 2:00 p.m.
Dept.: 6
Judge: Hon. Jon S. Tigar

Complaint filed: September 19, 2018
Consolidated Class Action Complaint filed:
October 31, 2019

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1 **I. INTRODUCTION**

2 Nothing in the opposition retrieves this case from dismissal. After four complaints,
 3 Plaintiffs still cannot plead their liability theory of reasonable deception, let alone plausibly.

4 The labeling neither promises nor implies that VPX's Bang® energy drinks or their
 5 ingredients will deliver more than a delicious, sugar-free capacity to stimulate and energize, yet
 6 Plaintiffs do not plead that the products fall short in that purpose. They also have never alleged
 7 what other effects or benefits, of any "potency," they reasonably expected from the products but
 8 supposedly did not receive. Rather, Plaintiffs' own histories of multiple repurchases over long
 9 periods of months or years render implausible any theory of unmet expectations. In any event,
 10 the entire liability theory remains an attempt to impose liability for "potency" puffery that this
 11 Court has already ruled to be non-actionable as a matter of law.

12 Further, the demand for punitive damages does not plead facts to match the law's
 13 substantive requirement that an officer, director, or managing agent engage in allegedly culpable
 14 conduct.

15 Plaintiffs have failed again to state their case, this time after careful guidance from this
 16 Court. The opposition gives no reason to believe they could cure the fatal defects in a fifth
 17 complaint. Instead, the Court should dismiss the matter with prejudice, as set out in VPX's
 18 opening papers and below.

19 **II. ARGUMENT**

20 **A. Plaintiffs' Liability Theory Remains Unpled, Stating No Plausible Deception
 21 Of Reasonable Consumers.**

22 VPX's motion established that the case requires dismissal in whole because the complaint
 23 did not and cannot plausibly plead its liability theory: that the labeling is supposedly false,
 24 deceptive, or violative of warranties or reasonable consumer expectations because Bang's®
 25 composition somehow lacks "any effect" as a "potent" energy drink.

26 The opposition does not credibly dispute that Plaintiffs' liability theory condenses to one
 27 word: "potency." *E.g.*, dkt. 116, ¶¶ 1-2, 8, 14, 19-20, 23-24, 27-28, 34, 44. Pervading the
 28 complaint, "potent" and "potency" appear expressly at least 37 times, and the complaint's other

1 allegations simply expound or repeat the potency theory in different words.

2 For example, the opposition attempts to narrowly refocus attention on the formalistic
 3 matter of whether the ingredients Plaintiffs dispute are sufficient in quantities “to have any
 4 effect.” Opp., 2. That is merely another way to say that Plaintiffs dispute the products’ potency.

5 In the same vein, the opposition also describes the liability theory as disputing the energy
 6 drinks’ capacity to “provide any effect on cognition or physical performance” or “physical or
 7 mental benefit.” Opp., p. 2. Again, those are just different ways to complain about the products’
 8 potency.

9 Crucially, nowhere in four complaints or two oppositions to dismissal have Plaintiffs ever
 10 once yet alleged what “effect on cognition or physical performance” or other “physical or mental
 11 benefit” they were reasonably expecting from Super Creatine®, BCAAs, CoQ10, or the energy
 12 drinks as a whole, but supposedly did not receive and enjoy. The complaint merely says that
 13 Imran, Hess, and Madison each expected some sort of “health and wellness benefits.” Dkt. 116,
 14 ¶¶ 19, 23, 27; *id.* at ¶¶ 20, 24, 28 (some type of unpled “mental and physical benefits”).

15 Attempting to obscure that failing beneath a superficial gloss of science, the latest
 16 complaint touts a handful of purported research studies. Dkt. 116, ¶¶ 44-56. Yet, even if their
 17 findings are 100% true, nowhere does the complaint allege, much less plausibly, that any
 18 Plaintiff or other consumer reasonably expected the effects or benefits described in those studies
 19 without obtaining them.

20 For example, none of the Plaintiffs allege they ever expected Bang® energy drinks to
 21 improve their “muscle oxygen supply,” “aerobic or anaerobic metabolism during endurance
 22 exercise,” “muscle soreness,” “memory errors,” “hand grip strength,” “vertical jump,” “protein
 23 synthesis,” “oxidative stress,” or assorted other parameters featured in the studies. *E.g., id.* at ¶¶
 24 48, 51, 55. The same goes for the complaint’s various references to subjects like “Alzheimer’s
 25 disease,” “dementia,” “building muscle mass,” “metabolism of skeletal muscle,” “synthesis of
 26 neurotransmitters,” and “Parkinson’s Disease.” *Id.* at ¶¶ 2-3, 36-38.

27 The reason Plaintiffs do not allege any such reasonable expectations is simple: Bang’s®
 28 labeling neither makes nor implies promises about any of this. *Id.* at ¶ 57 (labeling example).

1 Rather, there remains no dispute that the purpose of an energy drink is simply to
 2 stimulate and energize the brain and body. That is why this Court already described Plaintiffs'
 3 theory in those terms. Dkt. 110 at 1 ("Specifically, Plaintiffs allege that VPX incorrectly touts"
 4 products' capacity to "provide energy-boosting effects."). In fact, the complaint actually admits
 5 that is all reasonable consumers expected. Dkt. 116, ¶ 44 (alleging tendency to "deceive or
 6 confuse reasonable consumers" expecting products "to 'fuel' physical and mental activities").
 7 Nowhere else does the complaint allege either that reasonable consumers or Plaintiffs themselves
 8 ever expected some other benefit from the products or their ingredients that they did not get.

9 Indeed, aside from energy and stimulation, it strains the imagination to conceive what
 10 other "effect on cognition or physical performance" or "physical or mental benefit" these
 11 Plaintiffs can possibly claim to have reasonably expected but missed. What else did they
 12 somehow presume from the labeling that just isn't there? None of their four complaints have
 13 ever said, nor does the opposition.

14 So, setting aside puffery for now, energy and stimulation could be the only type of
 15 beneficial "potency" at issue, and the complaint pleads no other. Yet, nowhere does the
 16 complaint allege that the Bang® energy drinks ever once failed to stimulate or energize these
 17 Plaintiffs. *Bitton v. Gencor Nutrientes, Inc.*, 654 Fed. App'x 358, 364 (9th Cir. 2016) (affirming
 18 dismissal of warranty claim where "complaint does not allege that the Testofen products cannot
 19 increase free testosterone levels, nor does it even assert that the product failed to do so for the
 20 named Plaintiffs"). Rather, the opposition now all but concedes that Bang® fulfills that purpose.
 21 Opp., p. 2.

22 Similarly, if Plaintiffs reasonably expected some other physical or mental effect or
 23 benefit different than "potent" energy and stimulation, they likewise have never alleged that their
 24 repeated Bang® consumption failed to deliver it, in addition to their failure to even plead what
 25 the supposedly missing effect or benefit was in the first place. The opposition does not
 26 acknowledge or confront these fatal deficiencies, which warrant dismissal without going further.
 27 See *Gencor Nutrientes*, 654 Fed. App'x at 364.

28 However, apart from those repeated failures to plead reasonable deception, Plaintiffs'

1 multiple repurchases of Bang® energy drinks over months or years affirmatively *foreclose* any
 2 plausible contention that they did not realize whatever mental or physical effect or benefit they
 3 reasonably sought, whether that was “potent” energy and stimulation or something else their
 4 complaint does not plead. Dkt. 116, ¶¶ 19, 23, 27 (admitting multiple repurchases over
 5 significant timespans up to two years).

6 These Plaintiffs appoint themselves under Rule 23(a) as typical of consumers whose
 7 claims will rise or fall on the reasonable consumer standard, but reasonable consumers do not
 8 keep repurchasing products that do not deliver reasonably expected benefits for months or years.
 9 In that way, Plaintiffs’ histories of multiple repurchases raise a strong inference that the products
 10 met their expectations as the self-appointed typical consumers, meaning they got what they
 11 bargained for, were not deceived, and have no injury. *Algarin v. Maybelline, LLC*, 300 F.R.D.
 12 444, 454 (S.D. Cal. 2014) (“it sounds in common sense that making repeat purchases indicates
 13 that the customer’s expectations have been met”).¹

14 Following *Algarin*’s reasoning, the Central District also noted that repeat purchasers of a
 15 glue product “evidently are not misled by [its] packaging and are not injured by any
 16 misrepresentation.” *Spacone v. Sanford, L.P.*, No. 2:17-CV-02419-AB-MRW, 2018 U.S. Dist.
 17 LEXIS 153916, at *22-26 (C.D. Cal. Aug. 9, 2018); *see also Moheb v. Nutramax Labs, Inc.*, No.
 18 CV 12-3633-JFW (JCx), 2012 U.S. Dist. LEXIS 167330, at *7 (C.D. Cal. Sep. 4, 2012)
 19 (consumers “who derived benefit from Cosamin and are satisfied users” “have no injury and no
 20 standing to sue”).

21 The opposition’s attempt to evade that common sense is not persuasive. The placebo
 22 effect or “influence of the...false advertising” are not germane where consumers can readily

23 ¹ Plaintiffs do not credibly distinguish *Algarin*. Contrary to the opposition, the *McCrary* case
 24 makes no attempt to distinguish *Algarin* or its common sense holding about repeat purchases.
McCrary v. Elations Co., LLC, No. EDCV 13-0242 JGB (SPx), 2014 U.S. Dist. LEXIS 200660,
 25 at *50 (C.D. Cal. Dec. 2, 2014) (sole mention of *Algarin* actually cites the case affirmatively).
 26 Plaintiffs’ reliance on *5-Hour Energy* is also misplaced. That case concerned allegations that the
 27 energy shot, contrary to its labeling’s express promise of five hours, “provides only a few
 28 minutes of energy, at most.” *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, No. MDL 13-
 2438 PSG (PLAx), 2017 U.S. Dist. LEXIS 13466, at *2 (C.D. Cal. Jan. 24, 2017). Here, by
 contrast, Plaintiffs do not allege any failure to stimulate or energize, nor do they plead what other
 benefit they reasonably expected from Bang® or its ingredients but did not receive.

1 perceive for themselves whether an energy drink they just drank delivers energy and stimulation
 2 to mind and body. Plaintiffs do not allege the products are placebos, nor can they. The
 3 opposition effectively concedes that Bang® fulfills its essential purpose as an energy drink to
 4 energize and stimulate Plaintiffs. Opp., p. 2. The complaint does not plead otherwise, nor allege
 5 what other effects or benefits Plaintiffs reasonably expected from the labeling but did not
 6 receive.

7 The opposition also cites a *dictum* in *Algarin* concerning dietary supplements “where the
 8 purported benefits are hard to ascertain or take time to actualize.” *Algarin*, 300 F.R.D at 458.
 9 Rather than energy drinks, the *Algarin* court had in mind dietary supplements like Vitamin C or
 10 zinc when represented to boost immune function, for example, or omega oils marketed to support
 11 cardiovascular health over time. *See id.* The actual existence of any such benefits tied to those
 12 products may be difficult for individual consumers to perceive on an individual level, or may
 13 only accrete gradually over long periods of habitual use.

14 Here, however, not once have these Plaintiffs ever alleged that they actually or
 15 reasonably expected Bang®, or any of the disputed ingredients, to confer any similar benefit of a
 16 type that would be hard to ascertain or take significant periods of time to manifest. Instead, an
 17 energy drink’s capacity to stimulate and energize is almost immediately perceptible to those who
 18 drink it. *See Algarin*, 300 F.R.D. at 458 (“consumers can readily discern whether or not [the
 19 makeup’s] claimed duration is true”). The complaint does not plead what other effect or benefit,
 20 of any character or potency, Plaintiffs reasonably expected.

21 Finally, the *Chavez* case does not help Plaintiffs. There, the defendant allegedly
 22 represented that the “DHA” ingredient in its “Juicy Juice” drink was effective to improve brain
 23 development in young children. *Chavez v. Nestle USA, Inc.*, 511 Fed App’x 606, 607 (9th Cir.
 24 2013). The plaintiffs alleged they relied on those representations in purchasing the product. *Id.*
 25 Here, in contrast, Plaintiffs have never alleged what unpled “physical or mental benefit[s]” they
 26 reasonably expected at purchase but supposedly did not receive when they drank Bang®
 27 repeatedly over months or years.²

28 ² Plaintiffs’ other cases are also inapposite or unhelpful. They do not deal with the plaintiffs’

1 After four complaints, Plaintiffs' liability theory of reasonable deception remains not just
 2 unpled under Rules 9(b) and 8, but implausible by virtue of their own multiple repurchases,
 3 requiring dismissal with prejudice on those bases alone.

4 **B. All Claims Require Dismissal Because They Rest On Puffery.**

5 To be sure, as set out in part A of this memorandum and VPX's opening papers, the
 6 entire case distills to the potency theory, but the Court has already ruled that potency messaging
 7 is non-actionable puffery as a matter of law. Dkt. 110 at 14. That independently requires the
 8 case's dismissal even if the Court does not find that the liability theory remains unpled or
 9 factually implausible.

10 In any event, the opposition makes no dispute that all of the following statements
 11 constitute non-actionable puffery, regardless of the particular cause of action they are asserted
 12 under:

- 13 1. "Potent"
- 14 2. "Power up with Bang's potent & body-rocking fuel"
- 15 3. "POTENT BRAIN AND BODY ROCKING FUEL" (e.g., dkt. 116, ¶ 42)
- 16 4. "Ultra" CoQ10

17 The Court already ruled that statements 1, 2, and 4 are non-actionable, and the opposition
 18 does not contest that statement 3 is puffing just like statement 2. Dkt. 110 at 14.

19 Undeterred by the Court's previous dismissal order, the latest complaint re-asserts that
 20 VPX is liable for the puffery without any leave or credible rationale for doing so. The opposition
 21 cites no case holding or even suggesting that a plaintiff must reassert zombie allegations in
 22 disrespect of an interlocutory dismissal order to preserve issues for appellate review.

23 In sum, the Court has already ruled that the potency messaging is non-actionable puffing,
 24 which eliminates the indispensable essence of the complaint and its theory. If the Court

25 failure to plead what benefits they reasonably expected but missed, the plaintiffs' own multiple
 26 repurchases, or the related implausibility of their deception theories. *Forcellati v. Hyland's, Inc.*,
 27 No. CV 12-1983-GHK (MRWx), 2014 U.S. Dist. LEXIS 50600, at *29 (C.D. Cal. Apr. 9, 2014)
 28 (class certification arguments about absent class members); *Racies v. Quincy Bioscience, LLC*,
 No. 15-cv-00292-HSG, 2020 U.S. Dist. LEXIS 1550, at *2-4 (N.D. Cal. Jan. 4, 2020) (motion to
 exclude testimony of one non-party consumer).

1 nonetheless determines that any crumbs are left behind, dismissal is appropriate to the full extent
 2 they invoke any of the four puffing statements.

3 **C. Plaintiffs Plead No Basis For Punitive Damages.**

4 The opposition pretends that the motion seeks to impose a heightened pleading standard
 5 for punitive damages. Opp., p. 5. That totally misses the point of the motion: after four
 6 complaints, these Plaintiffs still have not pled the basic substantive requirements of Civil Code
 7 section 3294 under *any* standard of pleading. In other words, the latest complaint still does not
 8 allege acts of an individual officer, director, or managing agent that sink to the level of
 9 oppression, fraud, or malice in regards to the liability theory concerning the disputed Bang®
 10 products.

11 That Civil Code section 3294(b) required them to do so is plain. “With respect to a
 12 corporate employer,” the oppressive, fraudulent, or malicious conduct “must be on the part of an
 13 officer, director, or managing agent of the corporation.” CAL. CIV. CODE § 3294(b). That is
 14 because “a company simply cannot commit willful and malicious conduct – only an individual
 15 can.” *Robinson v. J.M. Smucker Co.*, No. 18-cv-04654-HSG, 2018 U.S. Dist. LEXIS 78069, at
 16 *17-18 (N.D. Cal. May 8, 2019); *see Xerox Corp. v. Far W. Graphics, Inc.*, No. C-03-4059-
 17 JFPVT, 2004 U.S. Dist. LEXIS 20579, at *7 (N.D. Cal. Oct. 6, 2004) (dismissing claim for
 18 punitive damages on that basis). Not long ago, this Court wielded section 3294(b)’s requirement
 19 to grant summary judgment of a punitive damages claim because the plaintiff failed to depose
 20 any “managing agent.” *Aparicio v. Comcast, Inc.*, 274 F. Supp. 3d 1014, 1032 (N.D. Cal. 2017).

21 The opposition does not grapple with section 3294(b)’s requirement or the case law
 22 applying it to dismiss punitive damages demands. Instead, it cites inapposite cases that do not
 23 implicate section 3294(b) or rest on allegations not present here. *Fausto v. Credigy Servs. Corp.*,
 24 598 F. Supp. 2d 1049, 1057 (N.D. Cal. 2009) (the court’s assessment of punitive damages did
 25 not even concern the Civil Code section 3294(b) argument presented by this motion); *Price v.
 26 Kawasaki Motors Corp., USA*, No. SACV 10-01074-JVS (RNBx), 2011 U.S. Dist. LEXIS
 27 157631, at *23-23 (C.D. Cal. Jan. 24, 2011) (same; case does not address requirement of section
 28 3294(b)); *Sloan v. 1st Am. Auto. Sales Training*, No. 2:16-cv-05341-ODW (SK), 2017 U.S. Dist.

1 LEXIS 58476, at *8 (C.D. Cal. Apr. 17, 2017) (motion to dismiss did not target the punitive
 2 damages demand, let alone based on section 3294(b), but merely considered potential for
 3 punitives in assessing CAFA amount in controversy requirement); *Franklin v. Ocwen Loan*
 4 *Servicing, LLC*, No. 17-cv-02702-JST, 2017 U.S. Dist. LEXIS 180455, at *8-9 (N.D. Cal. Oct.
 5 31, 2017) (challenge not based on failure to plead requirement of section 3294(b)); *Kanfer v.*
 6 *Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1108 (S.D. Cal. 2015) (unlike here, plaintiff made
 7 express allegations that senior officers and directors had full knowledge or reckless disregard of
 8 the alleged misconduct); dkt. 116 (no such allegations).

9 Here, the only allegations that mention any VPX officer do not plausibly allege fraud,
 10 oppression, or malice on the officer’s part corresponding to the theory on which Plaintiffs seek to
 11 impose liability for the Bang® products. Dkt. 116, ¶¶ 12-13. Six of the allegations they level at
 12 Jack Owoc do not relate to the potency of Bang’s® composition, nor even appear to concern
 13 Bang®, as opposed to other products in the VPX portfolio. *Id.* at ¶ 12(a), (b), (c), (f), (g), (h).

14 Beyond that, *none* of the matter in paragraphs 12-13 amounts to plausible assertion that
 15 he personally set out to devise or distribute an energy drink that shortchanges consumers with
 16 ingredients that fail to stimulate or energize them. Much less do paragraphs 12-13 plausibly
 17 plead that any such unalleged concrete acts he supposedly took in that regard were conducted
 18 oppressively, fraudulently, or maliciously. *Id.*; *id.* at ¶¶ 12(d), (e), 13. Serving as the “public
 19 face” of his company is certainly not an act of oppression, fraud, or malice. Similarly,
 20 “micromanagement,” “hiring and oversight,” or holding the “final say” are pleading clichés that
 21 any plaintiff could allege about any generic chief executive.

22 Because of their four complaints’ successive failures to plead in conformance with
 23 section 3294(b), Plaintiffs resort to arguing that the Court is powerless to do anything about it, as
 24 though demands for punitive damages must be left to the “ultimate trier of fact” no matter how
 25 deficient the pleading. Opp., p. 6. That is not the law, and certainly not as decreed by this Court.
 26 The opposition twists this Court’s *Franklin* decision, which holds nothing of the sort, nor even
 27 suggests that deficient demands for punitive demands are somehow exempt from Rule 12
 28 challenge. *Franklin*, 2017 U.S. Dist. LEXIS 180455, at *8-9 (finding allegations sufficient to

1 withstand challenge that, unlike here, was not based on failure to plead requirement of section
 2 3294(b)). The opposition's only other citation on this question, from Florida, also misses the
 3 mark, given that a large chunk of that court's analysis expressly concerned whether the plaintiff
 4 there met "pleading requirements for punitive damages." *Doe v. Royal Caribbean Cruises, Ltd.*,
 5 No. 11-23323-Civ-Goodman, 2012 U.S. Dist. LEXIS 36274, at *9 (S.D. Fla. Mar. 19, 2012).

6 **III. CONCLUSION**

7 After four complaints, Plaintiffs have failed again to plead their liability theory, let alone
 8 plausibly and without relying on non-actionable puffing. Dismissal with prejudice is warranted.
 9 VPX respectfully asks the Court to grant the motion in full.

10 Dated: April 30, 2020

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the action. My business address is: Gordon Rees Scully Mansukhani, 101 W. Broadway, Suite 2000, San Diego, CA 92101. My electronic mail address is sdaubert@grsm.com. On April 30, 2020, I served the foregoing document(s) entitled:

**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED CONSOLIDATED COMPLAINT**

as follows:

- BY ELECTRONIC SERVICE THROUGH THE CM/ECF SYSTEM** which automatically generates a Notice of Electronic Filing at the time said document is filed to all CM/ECF Users who have appeared in this case. Service with this NEF constitutes service pursuant to FRCP 5(b)(E).

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on April 30, 2020 at San Diego, California.

Shawn Daniel

Sharon Daubert

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